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In The
Supreme Court Of The United States
OCTOBER TERM, 1953

No. 128

THE COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, A BODY CORPORATE, ET AL.,
Appellants,

vs.

STATE MILK COMMISSION

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

APPELLANT'S REPLY TO APPELLEE'S SUPPLEMENTAL BRIEF AFTER ARGUMENT

Appellee contends, in supplemental brief, that the Arlington County Board "lacks status to prosecute the appeal."

To the contrary, the Arlington County Board contends that the U. S. Supreme Court has jurisdiction in this appeal, for the following reasons:

(1) Jurisdiction is conferred by Section 1257 (2) of the Judicial Code, Title 28, U. S. Code.

(2) The Arlington County Board is a proper party to raise the constitutional issue.

In both of these contentions, the argument is made that the Court has jurisdiction by reason of the action of the State courts, and that the question of the capacity of the Board to be appellant should not be raised at this stage in the proceeding.

ARGUMENT

I.

Jurisdiction Is Conferred By Section 1257 (2) Of The Judicial Code, Title 28 U. S. Code.

This Court has jurisdiction to entertain this appeal by reason of the provisions of Section 1257 of the Judicial Code, Title 28, U.S.C., which reads as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . . . .
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Under this section, it is clear that the only condition precedent to jurisdiction of this court is a decision of the highest court of the State upholding the validity of a State statute as against a contention that it violated Federal law. Such is the case here.

Under Section 1257 (2) there is no jurisdictional require-

ment with respect to parties nor with respect to any other procedural or remedial problem connected with the State court decision. Where the State courts have concerned themselves entirely with the merits of the Constitutional issue affecting the validity of the State statute, that is the only question here on appeal. The remedial procedure allowed by the State should be respected. In *First Nat. Bank* v. *Anderson*, 269 U. S. 341, 346, this Court said:

> "The Supreme Court of the State treated the case as cognizable in equity and perceived no obstacle to a consideration of the merits as displayed in the petition. In this that court was proceeding within limits where the state laws and practice were controlling, and its action is not open to revision here. In cases coming from state courts this Court's power and concern are specially directed to rulings made or refused on federal questions.

Under this rule, if the State has provided a remedy by which the Arlington County Board could test the validity of the State statute, attacked on Constitutional grounds, then there should be no reason why the U. S. Supreme Court should refuse to review the matter on appeal.

By concerning itself only with the issues decided by the State court, the U. S. Supreme Court would reach two desirable results: On the one hand, it would give "full faith and credit" to State procedural and remedial matters, and give full recognition of States' rights in these matters. On the other hand, the U. S. Supreme Court would relieve itself of the necessity of considering procedural and remedial intricacies by concerning itself only with the question of conflict of Federal and State laws. As Section 1257 is permissive, in use of the words "may be reviewed", the

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Court may exercise its discretion to dismiss an appeal which lacks merit on the Federal question.

Counsel for appellee does not refer to Section 1257 in its supplemental brief nor to any of the provisions of the Judicial Code affecting jurisdiction. Cases are cited without regard to the particular jurisdictional statutes involved, and citations of precedents are misleading because not related to the applicable statutes. For example, appellee cites *Smith* v. *Indiana,* 191 U.S. 138; but that decision states that no Constitutional issue was raised in the State courts, and therefore section 1257 (2) of its antecedent statutes could not have been the basis for jurisdiction, regardless of the interest of the appellant, because no Federal question was involved in the decision of the State court upholding of the State law.

Two other cases cited by appellee did not even involve appeals from State courts, but involved the jurisdiction of the Federal Courts to review orders of the Interstate Commerce Commission; *Moffat Tunnel League* v. *United States,* 289 U. S. 113, and *Edward Hines Yellow Pines, Trustees,* v. *United States,* 263 U.S. 143. In those cases the jurisdictional and procedural statute was the Urgent Deficiencies Act of 1913, carried forward into sections 2321 to 2325 of the Judicial Code, Title 28 U.S.C. Section 2323 specifies the parties which may enter the Federal proceedings, and the question of parties is a Federal question involving only Federal law. Section 1257 (2) of the Judicial Code could not possibly have been involved in those cases.

Appellee also confuses decisions holding that there is no Federal question involved in a case, which is entirely different from the capacity of a litigant to be an appellant. Those cases have no relevance to the problem which the Chief Justice assigned to appellee's counsel; *Pawhuska* v. *Paw-*

huska Oil & Gas Co., 250 U.S. 394; *Liberty Warehouse Co.* v. *Burley Tobacco Growers Co-op Assn.*, 276 U.S. 70; *Williams* v. *Mayor and City Council of Baltimore*, 289 U.S. 36; *Trenton* v. *New Jersey*, 262 U.S. 182. Furthermore, the Baltimore case did not involve any decision of a State court, the action began in Federal district court. The New Jersey case is actually contrary to appellee's position, because there the U.S. Supreme Court allowed the City of Trenton to be appellant in a case against the State, and decided the case on the merits of the Constitutional defense.

The price-fixing order of the Virginia Milk Commission, involved in this case was legislative in nature, and hence is a State statute within the meaning of Section 1257 (2); see *Lake Erie & W. R. R. Co.* v. *Pub. Util. Comm.*, 249 U.S. 422, 424; *Live Oak Assn.* v. *R. R. Comm.*, 269 U.S. 354, 356; *Hamilton* v. *Regents*, 293 U.S. 245, 257-8. The "validity" of a State statute is sustained by State courts, for the jurisdictional purposes of Section 1257, when held applicable to a particular set of facts as against the contention that such application is in violation of the Commerce Clause of the U. S. Constitution; *Dahnke-Walker Co.* v. *Bondurant*, 257 U.S. 282, 287-290.

In this case, the State Milk Commission and the State courts have construed a statute as applicable to interstate commerce, in a manner which appellant has contended is contrary to the Commerce Clause of the U. S. Constitution, within a field in which the States have no jurisdiction whatsoever. The interpretation of the law by the State Milk Commission is found at pages 94-95 of the record. This interpretation was upheld by the Circuit Court of the City of Richmond, which issued a decree saying (R. 102):

> "Upon consideration whereof, it appearing to the Court that the Arlington-Alexandria Order No. 4,

> establishing a minimum sale price for milk in the Virginia Arlington-Alexandria Market Area, does not constitute an unconstitutional burden on interstate commerce and that the State Milk Commission can lawfully establish the minimum sale price of fluid milk sold and delivered to consumers in the Arlington-Alexandria Market area, irrespective of the point of origin of the milk so delivered."

In its letter opinion (R. 101), the Circuit Court said that the price could be fixed by the State Milk Commission on milk "sold and delivered to consumers in the Arlington-Alexandria Market Area from trucks of the District of Columbia distributors."

The Virginia Supreme Court of appeals held (R. 148):

> "The petition of The County Board of Arlington County, Virginia, for an appeal from a decree entered by the Circuit Court of the City of Richmond on the 22nd day of July, 1952, in a certain proceeding then therein depending, wherein the said petitioner was plaintiff and State Milk Commission was defendant, having been maturely considered and a transcript of the record of the decree aforesaid seen and inspected, the court being of opinion that the said decree is plainly right, doth reject said petition and refuse said appeal, the effect of which is to affirm the decree of the said circuit court."

As brief as this statement is, the fact is clear that the Virginia Supreme Court ruled upon the merits of the case. It will be noted that the petition for appeal and the answer of the Attorney General dealt only with the merits of the case,

and not with any procedural or remedial questions (R. 105-148).

From the foregoing, it is clear that the *requirements* for jurisdiction in Section 1257 (2) of the Judicial Code have been satisfied, and that this court may properly entertain an appeal.

II.

The Arlington County Board Is A Proper Party To Raise The Constitutional Issue.

As previously argued, the capacity of the Arlington County Board to invoke the Constitutional guarantee of free trade is a remedial and procedural matter for the State courts, and decision by the State Supreme Court is all that was *required* to appeal the matter to the U. S. Supreme Court under Section 1257 of the Judicial Code.

On the other hand, an explanation of the status of the Arlington County Board should make clear that it was a proper appellant in this case.

The supplemental brief of appellant's counsel overlooks much of Virginia law applying to the instant situation. First of all, counsel overlooks the fact that Arlington County is governed by a special statute prescribing the County Manager Plan of government applicable only to Arlington County; Title 15, Chapter 12, Section 15-350 et seq. Code of Virginia, 1950. There are many other special statutes also applying only to Arlington, not readily recognized as such. The governing body is designated the "County Board", and is a "body corporate" with power to sue and be sued. It has the general powers of counties

(and also of cities), and under section 15-8 (5) of the Code of Virginia, 1950, has the following powers:

> "To adopt such measures as they may deem expedient to secure and promote the health, safety, and general welfare of the inhabitants of their respective counties, not inconsistent with the general laws of this State."

The appellee does not deny that this appeal is within the discretion of appellant to secure and promote the general welfare of the inhabitants of the county; but appellee merely contends that this appeal is inconsistent with the general laws of the State. However, appellee does not cite any statute of Virginia nor decision of any Virginia Court to that effect.

To the contrary, however, the Virginia Courts have allowed the Arlington County Board, as well as other similar governing bodies, to attack an order of a State commission. For example, in *"Board of Supervisors of Arlington County, etc.,* v. *Commonwealth of Virginia, ex rel., The Chesapeake and Potomac Telephone Company of Virginia,"* 186 Va. 963, the Arlington County Board was allowed to appeal an order of the State Corporation Commission increasing telephone rates. The writer of this brief knows of his own personal knowledge that this was done at the insistence of the consumers residing in the county and for their protection. See also a similar case in *Norfolk* v. *Chesapeake, etc., Tel. Co.,* 192 Va. 292. In those cases there was no question of the right of the county and municipalities to appeal the case, and the decisions were upon the merits.

One reason why there has been no question of the capacity of the public bodies to appeal the orders of State commissions is the fact that the remedial appeal statutes are

similar to the Virginia Milk and Cream Act in that they give the right of appeal to "any person aggrieved"; section 3-369, Virginia Code of 1950. The Virginia Supreme Court has said: "The term 'aggrieved' is broader in its scope than the term 'party in interest' . . . .", *Commonwealth* v. *Sharp*, 155 Va. 714, 717.

Representation of consumer interests is a continuous and regular function of the Arlington County Board. It has an official Public Utilities Commission, with a paid staff, which advises the County Board in these matters, but does not have regulatory powers. This Public Utilities Commission has been in existence for a long time, long before the milk case developed. It advises the Board upon milk regulatory matters. On a state-wide basis, the Arlington County Board joins with cities of the State in public utility matters through its membership in the Virginia League of Municipalities, and it is a function of the League to intervene in regulatory matters for protection of inhabitants of these urban areas on a Statewide basis. This practice has been in existence for a long time in Virginia, and has not been regarded as inconsistent with State law. The above-cited cases of the Virginia Supreme Court show that the practice is considered proper.

Neither is there anything inconsistent with Federal law in suit by one branch of the government against another; this Court so held in *United States* v. *I. C. C.*, 337 U.S. 426, 430-432, in which the U. S. government sued itself to appeal an order of the Interstate Commerce Commission. Likewise, in *Trenton* v. *New Jersey*, 262 U.S. 182, this court allowed the City of Trenton to be appellant in a case against the State of New Jersey, and decided the case upon the merits of a contention that it had certain water rights protected against the State by the Contract Clause of the U. S.

Constitution. The capacity of the City of Trenton to appeal was not questioned in that case.

Appellee cites *Moffat Tunnel League* v. *U. S.*, 289 U.S. 113, which involved an appeal of an I. C. C. order. The Court held that the League could not appeal because it was a voluntary association which had no power to sue and be sued, and hence could not appeal. But the court also said (289 U.S. at page 119):

> "Consequently the complainant must show that plaintiff has, *or represents others* having, a legal right or interest that may be injuriously affected by the order."

Furthermore, the Court also indicated that if the suit had resulted from official action of the two county boards, the court might have found such proper representation (see 289 U.S. at page 118).

As a practical matter, Arlington consumers have no remedy to protect their constitutional right of freedom to trade in interstate commerce unless the County Board is permitted to appeal on their behalf. Assume, for illustration, that the average family in Arlington consumes two quarts of milk per day, or twice 365 quarts per year. The increase of price prescribed by appellee, in the order here questioned, was one-half cent per quart, or $3.65 per year for such family. These consumers would have a "legal interest" to appeal, *Youngstown Co.* v. *United States*, 295 U.S. 476, 479, but this interest cannot be protected by appeal to this Court as a practical matter, because it involves too small a sum. Collectively, however, the 40,000 households in Arlington could appeal through the County Board for only 2 1/2

cents each for every $1,000 spent in this appeal; and in this manner a practical remedy becomes available.

On the other hand, the one-half cent per quart is a large sum in the total for each distributor. There is no doubt about their rights to appeal to this court on the grounds of confiscation or violation of the Commerce Clause. Furthermore, the cost of the appeal would come from the sums collected from the consumers for the milk involved in the appeal.

Unless a practical remedy for appeal is made available, then a discriminary situation would result. If it is a practical impossibility for consumers to appeal, leaving the distributors with a practical remedy, then only one side to the controversy actually has Constitutional protection. As the constitutional rights of a large group of people are involved, the Court should be sensitive to the practicalities involved, and should review the case on its merits.

The right of representative parties to sue has been recognized by this Court in exceptional cases where numerous persons are involved, where it is impractical to bring them all before the court, and where the party bringing the action "may fairly be presumed to represent the rights and interests of the whole." *Smith et al* v. *Swormstedt*, 16 Howard 288, 302. Certainly, appellant County Board should qualify under this rule.

In *Hood & Sons* v. *Du Mond*, 336 U.S. 525, involving application of the Commerce Clause to milk regulation by a State, this Court said:

> "Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality."

But there will be no reality to this constitutional guarantee of freedom of trade and competition if this Court denies to the people of Arlington their only practical legal remedy to determine the issue.

The right of government to represent citizens is not new. In the Girard College Case, *Vidal et al* v. *Girard's Executors*, 2 Howard 127, 195, Justice Story pointed out the old rule of common law that the "king, as parens patriae, has a right by his proper officers, to call upon the several courts of justice, according to the nature of their several jurisdictions, to see that right is done to his subjects who are incompetent to act for themselves, as in the case of charities and other cases." Surely, constitutional rights are no less important than administration of charities!

It is the position of the Arlington County Board that it may use its discretion in this case to exercise its statutory power to sue as a corporate body to carry out its statutory duty to "secure and promote" the "general welfare of the inhabitants" of the county; and that when the State courts allow this action, then the U. S. Supreme Court should take jurisdiction under Section 1257 (2) of the Judicial Code, without questioning the right of the County Board to be the appellant.

CONCLUSION

It is the position of Arlington County Board that the U. S. Supreme Court has jurisdiction of the appeal in this case by reason of the provisions of Section 1257 of the Judicial Code; that the remedial and procedural matters leading to decision of the State Courts is not subject to attack at this stage of the proceeding, and that because of

the public importance of the issues, the Court should determine the Constitutional issues upon their merits.

As oral argument in the above question took much of the limited time from argument of the Commerce Clause subject, appellant suggests that further oral argument may be helpful to the Court.

Respectfully submitted,

MALCOLM D. MILLER
Attorney for the Arlington County Board